UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	**CASE NUMBERS**
DANIEL DAVID DELPIANO, Debtor,	BANKRUPTCY CASE NO. 03-82293-MGD
MICROFINANCIAL, INC., Plaintiff, v. DANIEL DAVID DELPIANO, Defendant.	ADVERSARY CASE NO. 04-6127 IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the Court on Microfinancial, Inc.'s ("Plaintiff") Motion for Summary Judgment ("Motion"). Plaintiff seeks a determination that a $23 million judgment debt owed by Daniel David Delpiano ("Debtor" or "Defendant") is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). This matter is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(I), and the Court has jurisdiction over it pursuant to 28 U.S.C. § 157 and 28 U.S.C. § 1334. After considering the Motion and the entire record in the case, the Court concludes that Plaintiff is entitled to summary judgment.

The Plaintiff commenced this adversary proceeding on April 19, 2004, by filing a complaint contending that a March 10, 2004 judgment entered against Defendant, issued by the United States District Court for the District of Massachusetts, in the amount of $23 million, predicated predominantly on fraud claims, should be determinative in establishing non-

dischargeability pursuant to 11 U.S.C. § 523(a)(2)(A). Defendant filed a timely answer to the complaint on May 19, 2004. Plaintiff filed its Motion for Summary Judgment on August 17, 2004. On October 22, 2004, pursuant to the entry of a stipulation by the parties, Defendant filed his response to the Motion.

In accordance with the requirements of Bankruptcy Local Rule 7056-1(b)(2), Plaintiff attached to its Motion a statement of undisputed material facts. As part of his response to Plaintiff's Motion, Defendant also filed a statement of material facts upon which he contests there are genuine issues of disputed material fact. However, Defendant never specifically addressed the vast majority of the statements of undisputed material facts asserted by Plaintiff in its Motion. Defendant merely states that Plaintiff's Statement of Undisputed Material Facts #24 - 28 contain only partial quotes or sections taken from the Findings of Fact of Judge Harrington and do not reflect any finding of "actual intent" to defraud by Defendant. (Defendant's Statement of Matters Upon Which There Are Genuine Issues of Disputed Material Fact, ¶1).

Bankruptcy Local Rule 7056-1(b)(2) states "[a]ll material facts contained in the moving party's statement which are not specifically controverted in respondent's statement shall be deemed admitted." *See Ellenberg v. Bouldin (In re Bouldin)*, 196 B.R. 202, 210-211 (Bankr. N.D. Ga 1996) (Murphy, J.) (Internal Revenue Service's failure to respond to Plaintiff's motion for summary judgment results in Plaintiff's statement of undisputed material facts being admitted); *Butler v. Liu (In re Liu)*, 288 B.R. 155, 157-58 (Bankr. N.D. Ga 2002) (Bihary, J.) (failure of United States Trustee to submit numbered responses to Debtor's statement of undisputed material facts results in admission of Debtor's listed facts facilitating the denial of §§ 727(a)(2) and (a)(4) claims); and *Perdue v. Caffey (In re Caffey)*, 248 B.R. 920, 924 (Bankr. N.D. Ga 2000) (Debtor's failure to respond to Plaintiff's statement of undisputed material facts

leads to admission of facts sufficient for the Court to find subject debt non-dischargeable pursuant to § 523(a)(9)). Consequently, all of Plaintiff's statements not specifically controverted by Defendant will be deemed admitted.

As a result, the undisputed material facts are as follows: when Defendant filed his bankruptcy petition under chapter 7 on November 14, 2003, the parties were already subject to a consolidated federal civil action captioned MicroFinancial Incorporated v. Sentinel Insurance Company Limited, et al., Civil Action No. 00-CV-10105-EFH, pending in the United States District Court, District of Massachusetts, before The Honorable Edward F. Harrington. (Plaintiff's Statement of Undisputed Material Facts, ¶¶2-4). In the federal case in Massachusetts, Plaintiff had alleged that Defendant fraudulently induced Plaintiff to loan Defendant's company $12 million for a line of credit that Defendant personally guaranteed. (*Id.,* ¶5). The lawsuit had a long and protracted history prior to the commencement of Defendant's bankruptcy proceeding, spanning almost four years. Defendant actively participated in the litigation, and during the course of the litigation Defendant was continuously represented by experienced counsel. (*Id.,* ¶¶6-8). Defendant's participation included, but was not limited to, filing a motion to dismiss; opposing Plaintiff's request for a preliminary injunction; filing an answer and counterclaims; filing a joint scheduling statement with Plaintiff; opposing Plaintiff's motion for summary judgment; opposing Plaintiff's motion for appointment of a special master; filing an emergency motion to stay proceedings; submitting a post-trial brief and proposed findings; and filing a post-trial motion to reopen the evidence. (*Id*, ¶7). On October 24, 2003, Defendant and his company, Premier Holidays International, Inc. ("PHI"), filed an Emergency Motion to Stay Proceedings due to the fact that Defendant and PHI were under investigation by a federal grand jury. Defendant argued that continuing with the trial would force him to choose between fully participating in the pending District Court action and protecting his right to protect

himself from criminal prosecution and his privilege against self-incrimination. (*Id.,*¶9). On October 29, 2003, Judge Harrington denied Defendant's Emergency Motion. (*Id.,*¶10). On Friday, November 14, 2003, Defendant filed his Chapter 7 petition in the Northern District of Georgia, Case No. 03-82293, and also filed a Suggestion of Bankruptcy in the Massachusetts District Court action (*Id.,*¶11). On Monday, November 17, 2003, the day the Massachusetts trial was scheduled to begin, Plaintiff filed an Emergency Motion for Relief from the Automatic Stay in the Bankruptcy Court. (*Id.,*¶12). The Bankruptcy Court granted Plaintiff's emergency motion the day it was heard, finding that the chapter 7 filing was timed to impede the commencement of the federal court trial, and as a result, lifted the automatic stay for cause. (*Id.,*¶13). Judge Harrington began the trial in Massachusetts District Court the next day, November 18, 2003. (*Id.,*¶14). Appearing on behalf of Defendant and PHI was attorney Stephen F. Gordon, a bankruptcy practitioner with more than thirty years of experience who has appeared in more than 200 matters before the United States District Court and the United States Bankruptcy Court in Massachusetts. (*Id.,*¶15). At the trial most of the evidence presented was directed towards establishing Plaintiff's fraud claim. (*Id.,* ¶18). On March 8, 2004, after a bench trial, the District Court issued a judgment in favor of Plaintiff and against Defendant (and PHI) in the amount of $23 million. (*Id.,* ¶20). Contemporaneous with the judgment issued in favor of Plaintiff, Judge Harrington also issued findings of fact and conclusions of law, dated March 8, 2004. Judge Harrington determined that in order for Plaintiff to establish fraud, it had to show that Defendant and PHI: (1) made a false representation of a material fact with knowledge of its falsity (2) for the purpose of inducing Plaintiff to act thereon (3) that Plaintiff relied upon the representation as true and (4) that Plaintiff relied upon it to its damage. (Judge Harrington's Finding of Facts and Conclusions of Law, p.10). The District Court determined that Plaintiff had established by a preponderance of the evidence that Defendant and PHI

committed fraud. (*Id.*).

Rule 56(c) of the Federal Rules of Civil Procedure, applicable herein by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also, Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Maniccia v. Brown*, 171 F.3d 1364, 1367 (11th Cir. 1999). In reviewing a motion for summary judgment, the court must view the record and all inferences therefrom in a light most favorable to the non-moving party. *See WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). "The party seeking summary judgment bears the initial burden to demonstrate to the [district] court the basis for its motion for summary judgment and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact .... If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going beyond the pleadings, that there exist genuine issues of material facts." *Hairston v. Gainesville Sun Publ'g. Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh'g denied*, 16 F.3d 1233 (11th Cir. 1994). The non-movant may not simply rest on his pleadings, but must show, by reference to affidavits or other evidence, that a material issue of fact remains. Fed. R. Civ. P. 56.

Plaintiff contends that the judgment rendered by the Massachusetts District Court, against Defendant on fraud and fraud-like causes of action satisfies the exception to discharge as stated in 11 U.S.C. § 523(a)(2)(A) based upon principles of collateral estoppel. Section 523(a)(2)(A) provides that "[a] discharge [in bankruptcy] does not discharge an individual debtor from any debt ... for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud, other

than a statement respecting the debtor's or an insider's financial condition[.]" 11 U.S.C. § 523(a)(2)(A). Essentially, Plaintiff's argument is that the finding of fraudulent conduct by Defendant in the Massachusetts District Court should be sufficient to implicate the dischargeability exception predicated on fraud in the bankruptcy proceeding, as it would apply to the debt owed by Defendant to Plaintiff.

Collateral estoppel serves to prevent the re-litigating of issues previously contested and determined by a valid and final judgment in another court. *HSSM #7 Ltd. Pshp. v. Bilzerian (In re Bilzerian)*, 100 F.3d 886, 892 (11th Cir. 1996). Collateral estoppel refers to the concept of "issue preclusion" whereby a judgment forecloses relitigation of a matter that has been litigated and decided. *Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1473 (11th Cir. 1986) *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 894 n.1, 79 L. Ed. 2d 56 (1984). The doctrine of collateral estoppel is based on the efficient use of judicial resources and on a policy of discouraging parties from ignoring actions brought against them. *Gonzalez v. Moffitt*, 252 B.R. 916, 920 (B.A.P. 6th Cir. Ohio 2000). There is no controversy as to the general applicability of the doctrine of collateral estoppel in applying in a discharge exception proceeding in bankruptcy court. *See Grogan v. Garner*, 498 U.S. 279, 284 n.11, 111 S. Ct. 654, 658 n.11, 112 L. Ed. 2d 755 (1991); *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672, 675 (11th Cir. 1993); *In re Yanks*, 931 F.2d 42, 43 n.1 (11th Cir. 1991); *Bilzerian* at 892.

In applying the doctrine of collateral estoppel, typically a bankruptcy court applies the law of the state in which the judgment was rendered in determining its preclusive effect. *St. Laurent,* 991 F.2d at 672; *Lusk v. Williams (In re Williams)*, 282 B.R. 267, 271-72 (Bankr. N.D. Ga 2002) (Mullins, J.) *In re Brownlee*, 83 B.R. 836, 838 (Bankr. N.D. Ga. 1988) *also see State Farm Fire & Cas. Co. v. Edie (In re Edie)*, 314 B.R. 6 (Bankr. D. Utah 2004); *Lincoln Trust v.*

Parker (In re Parker), 250 B.R. 512, 526 (M.D. Pa. 2000). However, in cases where the prior judgment originated from a federal court where jurisdiction was based upon diversity of citizenship, such as in the case presently before the Court, the great weight of authority points towards applying federal law. *Empire Fire & Marine Ins. Co. v. J. Transport, Inc.,* 880 F.2d 1291, 1294 n.2 (11th Cir. 1989); *also see Gonzalez v. Moffitt*, 252 B.R. 916, n.3 for list of cases in various circuits that look to federal common law. As a result, despite the fact that the Massachusetts District Court looked to Massachusetts law for the fraud claim, the Court will look to federal common law to ascertain whether collateral estoppel applies.

There are several prerequisites for collateral estoppel to be applicable: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the bankruptcy issue must have been actually litigated in the prior litigation; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action; and (4) the burden of persuasion in the discharge proceeding must not be significantly heavier than the burden of persuasion in the initial action. *Blizerian*, 100 F.3d 886, *Bush v. Balfour Beatty Bahamas (In re Bush)*, 62 F.3d 1319, 1322 (11th Cir. 1995) (citations omitted).

Addressing the first requirement for collateral estoppel, whether the issue at stake in this adversary proceeding is identical to the one litigated in the prior litigation, the Court finds that it is. In order to prevail on a § 523(a)(2)(A) claim, the creditor must prove by a preponderance of the evidence: (1) the debtor made a false representation with intent to deceive the creditor; (2) the creditor relied upon the representation; and (3) the creditor suffered a loss as a result of the representation. *St. Laurent*, 991 F.2d 672. In concluding that Defendant committed fraud, Judge Harrington determined that Defendant and PHI: (1) made a false representation of a material fact with knowledge of its falsity (2) for the purpose of inducing Plaintiff to act thereon (3) that Plaintiff relied upon the representation as true and (4) that Plaintiff relied upon it to its

damage." (Judge Harrington's Finding of Facts and Conclusions of Law, p.10).

Defendant, in his response to Plaintiff's motion for summary judgment, contends that the issues are not identical because the standard for non-dischargeability in the 11th Circuit pursuant to 11 U.S.C. § 523(a)(2)(A) requires actual "intent to deceive" and that the language Judge Harrington used was "for the purpose of inducing [Plaintiff] to act thereon." The Court finds no legal significance to Judge Harrington's choice of the phrase "for the purpose of inducing [Plaintiff] to act thereon" as opposed to "intent to deceive." The requirements for fraud under Massachusetts law are sufficiently identical to what is needed to establish a claim under § 523(a)(2)(A) and therefore satisfies the first test for collateral estoppel. *See St. Laurent*, 991 F.2d 672. Additionally, Judge Harrington's detailed findings make it abundantly clear he found ample evidence that Defendant knowingly and intentionally orchestrated a scheme for purpose of inducing Plaintiff to loan him $12 million. (Judge Harrington's Finding of Facts and Conclusions of Law, pp.10-13).

Additionally, the Court finds that the matter was actually litigated in the prior litigation. In order to establish that an issue was "actually litigated" for collateral estoppel to be applicable, only two requirements need be met: (1) that the issue has been effectively raised in the prior action, either in the pleadings or through development of the evidence and argument at trial or on motion; and (2) that the losing party have had a "fair opportunity procedurally, substantively and evidentially" to contest the issue. *Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush)*, 62 F.3d 1319, 1323 (11th Cir. 1995)*, Overseas Motors, Inc. v. Import Motors Ltd.,* 375 F. Supp. 499, 516 (E.D. Mich. 1974), *aff'd* 519 F.2d 119 (6th Cir. Mich. 1975), *cert. denied,* 423 U.S. 987, 96 S.Ct. 395, 46 L.Ed.2d 304 (1975). On both counts, the evidence overwhelmingly suggests that the matter was "actually litigated" pursuant to 11th Circuit law.

There appears to be no question that the issue of fraud was effectively raised in the

district court proceeding. The action in federal court in Massachusetts was initiated in January, 2000. Plaintiff raised claims of fraud in its counterclaim filed in May 2001. Plaintiff's fraud claim was a central contention all throughout the litigation. Judge Harrington's findings include several pages of discussion of the factual and legal issues addressing the claims of fraud. The District Court tried each element necessary for a determination of fraud, a requirement for the matter to be considered actually litigated. *See St. Laurent* at 676.

Defendant contends that the matter was not "actually litigated" because he did not have a "full and fair opportunity to litigate the issues, procedurally, substantially and evidentially." Defendant argues that he was not present because a Grand Jury investigation was ongoing and he was afraid he might subject himself to possible criminal liability, and furthermore he had a bankruptcy case in Atlanta. Furthermore, Defendant contends that he should not be placed in a situation where he has to potentially lose his 5th Amendment guarantees against self-incrimination. The Court disagrees with Defendant on his interpretation of 11th Circuit case law on the subject.

The Court notes that the "full and fair opportunity" requirement is rooted in due process concerns. *Lusk v. Williams (In re Williams)*, 282 B.R. 267. The key for the Court to evaluate as to whether a defendant has had a full and fair opportunity to contest the issue is to determine whether the party had adequate notice of the issue and was afforded the opportunity to participate in its determination. *Id*. Here, Defendant does not argue that he did not know about the issue, merely that fear of subjecting himself to potentially criminal liability prevented him from fully investing himself in the litigation. However, there is no question that Defendant had a full and fair opportunity to litigate the fraud claim and that is what is dispositive. In *In re Bush*, the 11th Circuit found the application of collateral estoppel to be appropriate even when the prior judgment was entered by default. "Where a party has substantially participated in an

action in which he had a full and fair opportunity to defend on the merits, but subsequently chooses not to do so, ... in such a case collateral estoppel may apply to bar relitigation of the issues resolved by the default judgment." *Id.* at 1325. In fact, all throughout the prior litigation, Defendant participated. Defendant was continuously represented by able and experienced counsel. By filing an answer, counterclaim, numerous pleadings and motions (including a successful opposition to Plaintiff's summary judgment motion), Defendant was unquestionably an active and full participant throughout the pendency of the litigation. Accordingly, the Court finds that the matter was actually litigated to the extent necessary to satisfy the standards set forth by the 11th Circuit.

Defendant does not contest that the determination of the fraud issue in the District Court was a critical and necessary component of the judgment issued by that Court. Judge Harrington entered judgments in favor of Plaintiff and against Defendant specifically on the count alleging fraud. The detailed findings concerning Defendant's fraudulent conduct were a necessary component to the judgment in favor of Plaintiff. In reading Judge Harrington's findings of fact and conclusions of law, there is no question that the fraud claims comprised most of the evidence and attention at trial. The determination as to whether Defendant (and PHI) committed fraud was a salient factor in the District Court's final conclusion to enter judgment on behalf of Plaintiff.

The fourth element of collateral estoppel, that the standard of proof in the prior litigation must have been at least as stringent as the standard of proof in the later litigation, is not in dispute and clearly is satisfied in the case. The preponderance of the evidence standard was applied by Judge Harrington in the Massachusetts District Court proceeding (Judge Harrington's Finding of Facts and Conclusions of Law, p.10). The same standard is applicable to claims of nondischargeability under 11 U.S.C. § 523(a)(2). *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

Based upon the foregoing, the Court concludes that collateral estoppel applies and that the judgment of fraud entered by the United States District Court in Massachusetts resolves the question of nondischargeability of the underlying debt pursuant to 11 U.S.C. § 523(a)(2)(A). Accordingly, it is

ORDERED that Plaintiff's Motion for Summary Judgment is hereby **GRANTED**. Plaintiff's judgment against Defendant in the amount of $23 million is hereby declared **NON-DISCHARGEABLE** pursuant to 11 U.S.C. § 523(a)(2)(A).

A separate judgment will be entered contemporaneously with this Order.

The Clerk is directed to serve a copy of this Order on Plaintiff, Defendant, and their respective counsel.

IT IS SO ORDERED.

At Atlanta, Georgia, this the _____ day of March, 2005.

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MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE